

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HIGHLANDS INSURANCE GROUP	:	CIVIL ACTION
	:	
v.	:	
	:	
GERALD JOSEPH VAN BUSKIRK,	:	
III, a minor by his Parents	:	
and Natural Guardians, GERALD	:	
JOSEPH VAN BUSKIRK, JR. and	:	
LORI ANN VAN BUSKIRK, a/k/a	:	
LORI ANN SHARP, et al.	:	
	:	
and	:	
	:	
THE WEST BEND COMPANY	:	
	:	
and	:	
	:	
GERALD VAN BUSKIRK, JR.	:	
LORI ANN VAN BUSKIRK.	:	NO. 98-CV-4847

MEMORANDUM & ORDER

J.M. KELLY. J.

JUNE , 1999

Defendants seek attorney fees for their successful defense of this declaratory judgment action. At trial, the jury rejected the claim of Plaintiff, Highlands Insurance Group ("Highlands"), that it was not obligated to defend Lori Ann Van Buskirk under her homeowner's insurance policy. Specifically, while the jury determined that Defendants received the notification relied upon by Highlands to alter the policy and deny coverage, the jury found that the notification Highlands mailed to the Van Buskirks was inadequate to give them notice of the applicable change in their homeowner's insurance policy.

BACKGROUND

The Van Buskirk's child was injured in an accident that involved a deep fryer manufactured by the West Bend Company. The Van Buskirks filed suit against the West Bend Company, and the West Bend Company filed a third-party complaint against Lori Ann Van Buskirk, alleging she negligently supervised her child. The Van Buskirks requested that Highlands defend and indemnify Lori Ann Van Buskirk. Highlands assumed the defense with a reservation of rights, and then filed the instant declaratory judgment action. Highlands argued that a family member exclusion, added to the Van Buskirk's policy as part of a policy renewal, excluded the coverage sought by the Van Buskirks.

Highlands relied upon a notice of a change in the Van Buskirk's homeowner's insurance policy. It is undisputed that the initial homeowner's policy issued to the Van Buskirks would have required Highlands to provide the requested defense. Prior to the accident with the deep fryer, a renewal of the homeowner's insurance policy purported to change the homeowner's insurance policy and eliminate this coverage through a family member exclusion. The jury was required to determine whether Highlands had adequately notified the Van Buskirks of the change to their policy and ensured that they understood the change. See Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1311 (3d Cir. 1994) ("an insurer may not make unilateral changes to an

insurance policy unless it both notifies the policyholder of the changes and ensures that the policyholder understands their significance").

DISCUSSION

In Pennsylvania, each party pays its own legal fees unless there is a statutory or contractual obligation or an established exception. Corace v. Balint, 210 A.2d 882, 887 (Pa. 1965).

Attorney fees have been allowed to insureds in Pennsylvania where the insurer refused to defend the insured in bad faith and the insured was required to bring a declaratory judgment action to initiate a defense. Montgomery Ward & Co. v. Pacific Indem. Co., 557 F.2d 51, 59 (3d Cir. 1977); Kelmo Enter. v. Commercial Union Ins., 426 A.2d 680, 683-85 (Pa. Super. 1981). Defendants argue that they are entitled to recover their attorney fees because Highlands acted in bad faith by seeking the declaratory judgment.

Highlands points out that the cases where attorney fees have been allowed in Pennsylvania all have involved an insured that was required to institute a declaratory judgment action when the insurer refused to provide a defense or indemnification. Therefore, Highlands argues, it did not act in bad faith because it provided a defense, reserved its rights, and brought this declaratory judgment action. Highlands' position would exalt the form of an insurer's denial of a claim over the substance of the denial. Highlands' actions in this matter have properly served

to mitigate any damages suffered by the Van Buskirks. See Beckwith Mach. Co. v. Travelers Indem. Co., 638 F. Supp. 1179, 1188 (W.D. Pa. 1986) (cost of hiring defense counsel and other defense costs is proper measure of damages when insurer breaches its duty to defend).

It does not necessarily follow that an insurer that acts to mitigate damages that may potentially be suffered by an insured has acted in good faith. Rather, the inquiry must be whether the insurer has a reasonable foundation for denying the claim. Trustees of the Univ. of Pa. v. Affiliated Risk Control Adm'rs of Pa., Inc., 815 F.2d 890, 911 (3d Cir. 1987). Highlands denied the Van Buskirk's claim because of a change in their homeowner's policy. The jury specifically found that a notice of the change in the policy had been sent to the Van Buskirks, but it was insufficient to give them notice of the addition of the family member exclusion. Whether notice was adequate in this case was a question properly given to the jury to answer and it appears that Highlands had a reasonable basis for its position. Highlands mailed a notice to the Van Buskirks with the intent of adding the family exclusion to their homeowner's policy. Whether the notice was sufficient was a question of fact. Accordingly, it cannot be said that Highlands had no reasonable basis for bringing this action, therefore an award of attorney fees would be inappropriate and the Motion shall be denied.

To the extent that the Van Buskirks seek an order from the Court taxing costs in this matter, such a request is properly placed before the Clerk of Court. Fed. R. Civ. P. 54(d)(1). That portion of Defendants' Motion shall be dismissed without prejudice.

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O R D E R

AND NOW, this day of June, 1999, upon consideration of the Petition for Attorney's Fees and Taxable Costs of the Defendants, Gerald Joseph Van Buskirk, III, a minor by his Parents and Natural Guardians, Gerald Joseph Van Buskirk, Jr. and Lori Ann Van Buskirk, and the Response thereto of Plaintiff, Highlands Insurance Group, it is ORDERED:

1. The Petition for Attorney's Fees is DENIED.
2. The Petition for Taxable Costs is DISMISSED
WITHOUT PREJUDICE.

BY THE COURT:

JAMES MCGIRR KELLY, J.